IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Chapter VIII, Rule 32(2) (b)
Description of case

Crl. Jail Appeal No. 126 of 2002

Date of decision 4 December, 2004

For the approval of:

Hon'ble Chief Justice V.S. Sirpurkar.

Hon'ble Mr. Justice Rajesh Tandon.

- Whether the order/judgment should be sent to the reporters for reporting? ( )

- Whether reporters be allowed to see the judgment? ( )

G

IN THE HIGH COURT OF UTTARANCHAL AT NAINITAL

Crl. Jail Appeal No. 126 of 2002

Surendra Kumar,
S/o Ram Krishan,
R/o Village Damoli,
Tehsil & P.S. Chachroli,
District Yamunanagar, Haryana. .....Appellant

Versus

State .....Opposite party

Mr. S.K. Mishra, learned Amicus Curiae for the appellant.
Mr. D.K. Sharma, learned government Advocate for the State.

Coram: Hon'ble V.S. Sirpurkar, C.J.
Hon'ble Rajesh Tandon,J.

Date: 4 December, 2004

Per Hon'ble Rajesh Tandon, J.

By the present appeal, the accused Surendra Kumar has challenged his conviction under Section 302 I.P.C. read with Section 201 I.P.C. and Section 34 I.P.C., by which the learned Sessions Judge has awarded him rigorous imprisonment for life along with co-accused Harinath. Here, were concerned with only accused Surendra Kumar as only he has preferred the present appeal before us.

2. Briefly stated the prosecution story was that on 28.12.1999, a written report was lodged by one Rajesh Kumar, who was associated with Ved Niketan Dham Ashram, to P.S. Laxman Jhula stating therein that one Jemison Rassel (deceased), an American citizen was staying in room No. 91 of the Ashram, Further, it has been stated that on 23.12.1999, the two friends of the said American, namely, Hillary and Autam came and enquired about the room, in which their friend Jemison Rassel (deceased) was staying. On this he, along with the two women, namely, Hillary and Autam, reached room No. 91 and found the room locked from outside. On 26.12.1999, when the said Jemison Rassel (deceased) did not return to Ashram, he opened room No. 91 on the insistence of the said women friends and then, in the said room, one bag (thaila), a watch, a Tiffin, three books, one dairy, one pent, one T-shirt and one driving license was found. So far as the driving license is concerned, the said two women friends kept it with themselves for photocopy and the rest of the articles were kept in that room. Since, the said American citizen has not returned in the Ashram, therefore, the said information was given.

3. On 4.01.2000 at about 9:10 in the night, Dr. J. Arum Raja Silwan dictated a report in English to Anil Srivastava, who translated it in Hindi and lodged the report at Police Station Laxman Jhula under Section 365 I.P.C According to the First Information Report, Dr. J. Arum Raja Silwan was the co-ordinator of Sita Pragramme (South India Term Abroad) at Madurai, in which American students were participating. In the

year 1999, one American student, namely, Jemison Rassel (deceased) also participated an on 20.12.1999, he came to Ved Niketan Ashram and stayed in room No. 91, where the two women fiends, namely, Hillary and Autam came to meet Jemison Rassel. The prosecution story also reveals that on 25.12.1999 Hillary informed Silwan on telephone that the whereabouts of Jemison Rassel are not known and on this, Silwan along with his assistant came to Laxman Jhula on 28.12.1999 and with the cooperation of the Police Authorities, he searched the said American citizen, namely, Jemison Rassel (deceased), but nothing was found. The investigation was done by Kailash Tewari, who was the In-charge of the Police Station, Laxman Jhula and during the investigation, one Vijay Singh Dhakad (P.W.4) informed that on 22.12.1999, one Surendra Kumar came to his shop along with seven cheques of 20 dollars each, but there was no signature and passport number on that cheques and therefore, the said cheques could not be cashed. On the basis of this information, on 6.01.2000, Surendra Kumar was arrested and at the instance of Surendra Kumar, the two books of the deceased Jemison Rassel and empty bottle of wine was recovered from the Hut (Kutiya) of the co-accused Harinath. Besides this, one bag (thaila), Muflar and one pair of Chappal was also recovered, which were lying beneath the stone on the bank of Ganga River. On 24.01.2000, the co-accused Harinath was also arrested and from his possession, a camera and a photocopy of the passport of Jemision Russell (deceased) was recovered and on the same day, at the instance of co-accused Harinath, the dead body of Jemison Russell was also

Recovered from the river. On interrogation from the accused persons the Investigating Agency revealed that Jamison Russell was done to death by accused Harinath by strangulation with the help of accused Surendra Kumar inside his Kutia at Laxmanjhoola.

4. A charge-sheet was submitted under Section 302/34 I.P.C. and 201/34 I.P.C. against the accused Surendra Kumar and Harinath. Before the Sessions Judge, both the accused pleaded not guilty and claimed to be tried. To prove its case, the prosecution has examined, in all 8 witnesses.

5. Prosecution has examined Anil Srivastava (PW1), who has deposed that in December, 1999 the American Embassy has lodged a report regarding the absconding of the American citizen and Dr. J. Arum Raja Silwan did not know the Hindi and he dictated the First Information Report (Ex. Ka. 1) in English and he translated the same in Hindi.

6. Dr. J Arum Raja Silwan was examined as PW2, who has deposed that he was organizing the Sita Programme as a co-ordinator and from August, 1999 he was doing this and from America, the students were coming to Madurai for study of Hinduism, Indian culture etc. In the first week of August, 1999 one Jemison Rassel (deceased) came from America and stayed with the Sita Programme till the first week of December, 1999 at Madurai. After that, he started visiting the other places and two other students, namely, Hillary and Autam also supposed to

Meet hi on 24.12.1999 at Rishikesh. Jemison Rassel (deceased) was staying at Ved Niketan Ashram and the said two women went to meet him there and them, they informed on telephone regarding the fact the at the whereabouts of Jemison Rassel are not known and then on 28.12.1999, he came along with his assistant at Rishikesh and he enquired about Jemison Rassel. When, up till 4.01.2000 Jemison was not found, then, he lodged the First Information Report (Ex.Ka. 1) at Laxman Jhula.

7. Rajesh Kumar (PW3) was also examined, who is the Care-taker of the Ashram, who has deposed the fact that according to the passport, Jemison Rassel (deceased) came to India on 6.08.1999 and he was staying in Room No. 91.

8. Prosecution has further examined PW4 Vijay Singh Dhakad. He has deposed that he sued to get encashment of travelers cheques at his shop. On 22.12.1999 one of the disciples of Baba Harinath namely Surendra Kumar came to his shop along with seven cheques of 20 dollars each, which were in the name of Jemison Rassel. The said cheques were without the passport number and signatures, therefore, he did not purchase them. Surendra Kukmar was arrested near Chuden Ghat and he has further stated that on the information of Surendra Kumar, the articles were recovered from the Kutiya and Surendra Kumar has also helped the prosecution in getting one pair of Chappal, muflar etc. Narain Dutt Narang (PW5) has also

Deposed that Surednra Kumar has informed that his Guru was involved in the murder and the articles are lying in the Kutiya.

9. Dr. O.P. Sharma (PW7) is the one, who conducted the post-mortem and the following two injuries were found on the body of the deceased:

i. blue spot 8 c.m. x 3 c.m. in the front portion of neck.

ii. Many blue spots, which were joined together in the area of 10 c.m. x 8 c.m. in the upper right portion of chest.

10. The prosecution has further examined Ved Pal Singh (PW7), who was posted at Police Station Laxman Jhula. He has deposed about the recovery of two English Books, bag, muflar, one pair of chappal etc. at the instance of accused Surendra Kumar.

11. Further, Kailash Panwar (PW8) was also examined, who has deposed that he was posted in December, 1999 up to 2000 at Police Station Laxman Jhula, where on 28.12.1999, one Rajesh Kumar has lodged the First Information Report (Ex. Ka. 3) regarding the absconding of Jemison Rassel (deceased) and therefore, on 4.01.2000, Dr. J. Arun Raja lodged the written Report (Ex. Ka.1) and as such, the case was registered under Section 365 I.P.C.

12. The accused Surendra Kumar in his statement under Section 313 CrPC. has denied the prosecution's allegations. Two specific questions were asked from Surrendra Kumar to the following effect:

i'u% अभियोजन साक्ष्य में आया है कि विवेचक ने आप सुरेन्द्र कुमार से पूछताछ की तो आप सुरेन्द्र कुमार ने बताया कि जेमिसन दिनांक 20.12.1999 को बाबा सीताराम के साथ, बाबा हरिनाथ की कुटिया में आया तथा चिलम व चाय पी और अगले दिन खाने की बाते हुयी, इसके बाद जेमिसन व बाबा सीताराम चले गये, आपकों क्या कहना हैध

mRrj% गलत है।

i u% अभियोजन साक्ष्य में आया है कि जब आप सुरेन्द्र कुमार शराब लेकर वापस आया तो जेमिसन, बाबा वासुकी नाथ व बाबा हरिनाथ बैठे थे और तीनों ने शराब पी तथा आप सुरेन्द्र कुमार ने खाया बनाया, सब ने खाना खाया तब बाबा वासुकी नाथ चले गये और बाबा हरिनाथ व जैमिसन बैठे रहे। दोनों ने 5–6 पैक और शराब पी। आपको क्या कहना है ध

mRrj% गलत है ।

Accused Surendra Kumar in his statement has also stated that police has falsely implicated him in this case after taking him from Ambala. Accused appellant has also examined Sardara Ram son of Joona Ram, resident of Kher Ki-Jatan, P.S. Narayangarh, District Ambala as D.W.1 in defence. He states as under:

लक्ष्मणझूला थाना के पुलिस वाले 4.1.2001 को सॉय के लगभग 7 बजे मुलजिम सुरेन्द्र पुत्र रामकिशन को हतारे गॉव से गिरफतार करके ले गये थें।

This witness has stated that he police party of Laxmanjhoola Police Station had arrested accused Surendra Kumar on 4.1.2001 at 7.00 PM at his village Kher-ki-Jatan.

This witness has proved his signature as well as the signatures of Chameli Ram, Ranjit Kumar and Sukhdev Singh on paper no. Ex.Kha-1.

13. The trial Court has convicted accused Harinath and Surendra Kumar under section 302 read with sec. 34 I.P.C. and Section 201 read with Section 34 I.P.C. vide judgment and order dated 7.5.2003, against which the present appeal has been preferred by accused Surendra Kumar only.

14. The conviction of the accused appellant is based on the circumstances three fold. The first circumstance is the discovery of the belongings of the deceased at the pointing out of accused Surendra Kumar. The prosecution has adduced evidence to prove that recovery of the books and an empty bottle of liquor was made at eh instance of the accused Surendra Kumar and recovery of the dead body of deceased was made at the pointing out of accused Hari Nath.

15. To prove the discovery under section 27 of the Evidence Act, the prosecution has examined S.I. Vedpal Singh 7. This witness has stated that on the pointing out of witness Vijai Dhakar, they apprehended accused Surendra Kumar near Pashulok Bairaj, Rishikesh. On inquiry Surendra Kumar confessed his guilt and had stated that he and his Guru Baba Harinath committed murder of Jamison Russell in their Kutia by strangulation and has thrown the dead body into the river. Accused Surendra Kumar had also informed that some belongings of the deceased had also been kept by them inside the Kutia and on the pointing out of the accused two books, one bag, a pair of chappal and muffler were recovered. This

witness also proved recovery memo Es.Ka.-5 and material Ex. 8 bag, Ex.2 Chappal and Muffler Ex. 7 However, from the cross examination of this witness it is evident that the investigating agency has not followed the procedure of search and discovery prescribed under Section 27 of the Evidence Act. This witness in his cross examination has admitted as under:

फर्द प्रदर्श क.5 में हम कर्मचारियों तथा गवाहान का एक दूसरे को तलाशी देने के बारे में नहीं लिखा है। यह सही है किम सुरेन्द्र को गिरफदार करने से पहले उसने जो कहा था उसे हम लोगों ने कही लिखा नहीं था, बाबा हरीनाथ की गिफतारी के समय जो हरीनाथ ने बताया था उसे कही लिखा नहीं था।

माल बरामद करने से पहले भी कोई फर्द हम लोगों ने मुलजिम के स्टेमेंन्ट के बारे में नहीं बनायी थी

16. The prosecution has also examined P.W. 8 S.I. Kailash Panwar. This witness has supported the statement of S.I. Vedpal Singh. He has stated in his examination in chief that in December 1999, he was posted as Station Officer, Laxmanjhoola. He has stated that during investigation he recovered two books and a empty bottle of liquor at the instant of accused Surendra Singh from the kutia of Harinath. He has also stated that Surendera Singh had pointed out the place where they thrown the dead body of the deceased but dead body could not be recovered from that place. He has submitted that the dead body was recovered from the river at the instance of co-accused Harinath. This witness has also stated that accused Surendra Kumar also got recovered a bag, a pair of sandal and a Muffler which was kept under a stone at riverbank. P.W.8 has proved recovery memo Ex.ka-5.

17. The prosecution has also examined public witnesses to prove discovery under section 27 of the Evidence Act. P.W.4

Vijai Singh Dhakar is a shop-keeper at Rishikesh. In his examination-in-chief this witness has stated that two books were recovered form the Kutia of Harinath at the instance of accused Surendra Kumar. He also proved books Ex.4 and Ex.5 he has further stated that accused Surendra also got recovered a bag, empty bottle, a pair of chappal and a muffler from the riverbank. This witness also proved Ex.6, 7 and 8. However, in his cross examination this witness has categorically denied that any recovery memo was prepared by the police at the time of recovery. He has also stated no paper was prepared in writing regarding the arrest of accused Surendra Kumar and information given by him regarding belongings of the deceased. This in view of the admission made by this witness in his cross examination that no recovery memo was prepared at the time of alleged recovery of the articles belonging to the deceased, the discovery under Section 27 of the Evidence Act has become worthless. In his cross examination he states as under:

गिरफतारी के समय मौके पर कोई ऐसा कागज नहीं बना जिसमें माल बरामद कराने वाली बात मुलजिम ने बताई हो और न मौके पर ही मुलजिम द्वारा बरामद कराने का कोई कागज ही बनाया था।

18. The prosecution has also examined Sri Narayan Dutt P.W.5 which is another witness of discovery. This witnesses has stated in his examination-in-chief that accused Surendra Kumar has confessed his guilt and had stated that he and his Guru had committed murder of the Englishman. Accused Surendra Singh got recovered one empty bottle of liquor and two books from the Dhooni. This witness has also stated that accused Surendra Kumar also got recovered a muffler, one bag

And a pair of chappal from the riverbank. P.W.5 Narayan Dutt has also stated that divers from the river on 23.1.2000 searched dead body of the deceased but the dead body could not be recovered. On 24.1.2000 dead body was recovered at the instance of accused Harinath. His statement in this respect is quoted below:

थाने पर बाबा हरीनाथ से पूछा कि जेरीसन की लाश कहॉ फेकी तब हरीनाथ आगे आगे चलकर गंगा नदी के किनारे पहुॅचा हमारे साथ मिलिट्री के कैप्टन और कर्मचारी थे जो जेरीसन की डेडबाडी को ढूढ रहे थे। तब हरीनाथ ने गंगा के किनारे खड़ा होकर एक पत्थर डाल कर बताया कि यहॉ बोरा फेंका है कैप्टन व उसके साथ उसके टीम के सदस्य थे गंगा में गोता लगाया ओर कैप्टन 3–4 मिनट बाद नदी से एक बोरा किनारे पर लेकर आया बोरा टाट का था बोरा खालने पर जो लाश निकली उसे देखकर कहा कि यही जेरीसन की लाश है।

In his cross-examination this witness has stated that when he was coming to his home from his shop police party met him near Swargasharm. Accused Surendra Singh was with them. This witness has stated that no recovery memo was prepared at the Kutia of Harinath from where the belongings of the deceased were recovered. In his cross examination this witness has also stated that on 23.1.2000 and 24.1.2000 like other public persons he had also gone to riverbank from where the dead body of the deceased was recovered and police asked him to become witness for the recovery of belongings of the deceased and the dead body. He states as under:

कुटिया से जो माल बरामद हुआ उसके बारे में उसके पूर्व कथन के बारे में लिखा पढ़ी भी कुटिया में नहीं हुई थी।

Thus this witness has completely disowned his statement made in his examination-in-chief and his statement cannot be made basis to convict the accused appellant Surendra Kumr.

19. Thus there remain the statements of only police witnesses regarding recovery of articles belonging to the deceased at the pointing out of accused Surendra Kumar. However, no proper and legal identification of the recovered articles was made by the police from any witness of the family of deceased or from any friend of the deceased and even if it is assumed that one pair Chappal, books and an empty bottle of liquor were recovered at the instance of accused Surendra Kumar, even then without following the legal procedure of recovery and proper identification of the articles, recovery of such items is not a circumstance to fasten the guilt of murder on the accused Surendra Kumar. This is apart from the fact that some articles were shown to have been recovered from the open places like the riverbank. We, therefore, do not propose to rely on the said discovery evidence. The trial judge has completely missed this important aspect and has presumed that the Chappals, muffler and the books belonged to the deceased.

20. It has also come in evidence that the books were recovered after the "Dhuni" was dug. In our opinion the books could never have remained intact, if the fire was lit over the portion where the books were buried. Even this aspect was missed by the trial Court.

21. Relying on the decision in the case of Delhi Admn. Vs. Bal Kishan reported in 1989 Supp.(2) SCC 351 and Mohd. Inayatuallah vs. State of Maharastra reported in 1976(1) SCC 828, the Apex Court, in the case Bodhraj vs. State of J & k

(2002) 8 SCC 45, while dealing with the recovery of section 27 of the Evidence Act, held as under:

> "*Emphasis was laid as a circumstance on recovery of weapon of assault, on the basis of information given by the accused while in custody. The question is whether the evidence relating to recovery is sufficient to fasten guilt on the accused. Section 27 of the Indian Evidence Act, 1872 (in short "the Evidence Act") is by way of proviso to Sections 25 to 26 and a statement even by way of confession made in police custody which distinctly relates to the fact discovered is admissible in evidence against he accused. This position was succinctly dealt with by this Court in Delhi Admn. Vs. Bal Kishan and Mohd. Inayatuallah vs. State of Maharastra. The words "so much of such information" as relates distinctly to the fact thereby discovered, are very important and the whole force of the section concentrates on them. Clearly the extent of the information admissible must depend on the exact nature of the fact discovered to which such information is required to relate*"

It is, therefore, clear that a discovered article must have a nexus with the crime. That precisely is wanting in this case. In the present case the prosecution has utterly failed to establish the identity of the articles discovered by accused Surendra Kumar. This the circumstances of discovery under section 27 of the Evidence Act, does not go to help the prosecution case in any way so far as the accused Surendra Kumar is concerned.

22. The second circumstance on which the Sessions Judge has relied is the statement of Surendra Kumar given by him during interrogation by the police. A perusal of the judgment of the Sessions Judge shows that the Sessions Judge based his finding on the statement made by accused Surendra Kumar under

section 161 Cr.P.C. before the Investigating Officer, treating it to be an extra judicial confession. The prosecution has tried to bring the statement of the accused on record by the statements of Investigating Officer P.W.8 Kailash Panwar and P.W. 7 S.I. Vedpal Singh. P.W.8 Kailash Panwar in his examination-in-chief states as under:

मैंने गिरफ्तारी प्रदर्श क–4 तैयार किया और मौके पर ही सुरेन्द्र कुमार से पूछताछ की और बयान दिया सुरेन्द्र कुमार ने बताया था कि दि0 20.12.99 को जेमिसन रसै क्युरेन नाम का एक अमेरिकन नागरिक बाबा सीताराम नामक साधू के साथ हमारी कुटिया पर सांय करीब 5.30 बजे आया था वहां पर जेमीसन व सीताराम ने मेरे गुरू हरीनाथ व मेरे साथ चिलम पी, मैंने सबको चाय भी पिलायी थी हरीनाथ ने जैमीसन को अगले दिन आने के लिए कहा था तथा साथ–2 खाने पीने की बातचीत हुई थी कुछ देर बाद सीता राम और जेमीसन कुटिया से चले गये थे दि0 21.12.99 को सुबह 10 बजे जैमीसन हमारी कूटिया पर अकेला आया और हरीनाथ व मेरे साथ चिलम व चाय पीने के बाद वहीं कुटिया के बाहर बैठ गया व किताब पढ़ने लगा, मेरे गुरू हरीनाथ ने जेमीसन से रू0 200/– लिए, ओर समय 11.30 बजे के करीब मुझे रायवाला अंगेजी शराब लेने भेज दिया, मैं बैगपाइपर की एक शराब की बोतल लेकर करीब 1.30 बजे दिन रायवाला से वापर कुटिया पर आया तब कुटिया में मेरे गुरू हरीनाथ व बाबा वासुकी नाथ व जेमीसन बैठे बातचीत कर रहे थे मैंने रायवाला से लाई शराब की बोतल गुरू हरीनाथ को दे दी, हरीनाथ ने मुझसे 3 गिलास मंगवाये वह तीनों शरीरब पीने बैठ गये, मैं खाना बनवाने लगा इस बीच तीनों ने दो दो पैग शराब पिये, बाबा वासुकी नाथ ने मुझसे रोटी सब्जी मांगी और खाता चला गया, हरीनाथ और जेमीसन पीते रहे 5–6 पैग पीने के बाद मेरे गुरू हरीनाथ ने चिलम बनायी जिसे हम तीनों ने पिया, उसके बाद मैंने जेमीसन और हरीनाथ को खाना दिया, खाना खाने के बाद हरीनाथ ने जैमीसन को मना करने के बाद भी हल्के पैग यह कह कर दिए कि कुछ नहीं होता

और आपके दोस्त हैं हरीनाथ ने मुझे पानी की बोतल लेने दुकान पर भेज दिया, दुकान से मैं पानी की बोतल खरीदकर लाया और जैमीसन को दे दी, जैमीसन पानी पीने के बाद यह कहकर वापस जाने लगा कि मैं अब आराम करने आश्रम जा रहा हूॅ, हरीनाथ ने मुझसे कहा कि मैं भी तुम्हारे साथ चलूंगा मैं खाना खा लूॅ तब तक रूके रहो, हरीनाथ ने मुझसे कहा कि कुटिया नं0 29 में बाबा परमनाथ काके देखकर आओ मैं कुटिया नं0 29 में गया तो यहां ताला लगा था तो मैं वापस आया तो मेरे गुरू हरीनाथ ने मुझसे कहा कि मैं इस साले अंग्रेज से कह रहा हूॅ कि चिलम व खाना खिलाने के बदले अपेन कुछ ट्वेल्स चैक व कैमरा मुझे दे दे लेकिन यह नही दे रहा है, तू दसके पैर पकड़ इसका काम तमाम कर देते हैं जैमीसन अन्दर कुटिया में बैठा था तथा अधिक नशा होने के कारण कुछ बोल नहीं पा रहा था। मैंने जेमीसन को कुटिया में नीचे गिराकर उसके पैर कसकर पकड़ लिए तथा गुरू हरीनाथ ने उसकी छाती पर बैठकर उसका गला दबा दिया, वह छटपटाता रहा, मैने मजबूती से उसके पैर पकड़े रखे, हरीनाथ ने तब तक उसका गला नहीं छोड़ा जब तक जेमीसन मर नहीं

23. It is an established law that a statement made by a witness in answer to the question put to him by a police officer in the course of investigation under the provisions of this Section cannot be made the foundation of charge. The Sessions Judge has relied upon the confession of his guilt made by accused Srendra Kumar in his statement under section 161 Cr.P.C. and has convicted him.

24. A perusal of the entire record shows that the investigation in this case has not been made properly. As per statement of the Investigating Officer, the accused confessed his guilt before him but the Investigating Officer did not make any effort to get the

Accused examined before a Magistrate under section 164 Cr.P.C. which may be the basis for conviction of the accused.

25. Further conviction of the accused may be based on the extra judicial confession made by the accused persons before the public witnesses. Although the Investigating Officer has stated that public witnesses were available at the time when the accused persons made confessional statement but no public witness has been examined on the point of extra judicial confession made by the accused persons. Vijay Singh Dhakad (PW4), has stated in his statement regarding discovery of even a single word that accused Surendra Kumar confessed his guilt and described the manner of causing death of deceased and disappearing the dead body. Vijay Singh Dhakad (PW4) has only stated as under:

जब हम, पुलिस वालें व सुरेन्द्र को लेकर लक्ष्मणझूला थाने आ रहे थे तो रास्ते में श्री नारायण नागर मिले तो उन्हें भी साथ लिया, तब उसके बाद हम सुरेन्द्र को लेकर पहुॅचे तथा थाने से लेकर सुरेन्द्र के साथ गंगा किनारे गये। थाने के सामने गंगा किनारे जो कुटिया है वहॉ गये थे। इस कुटिया में पुलिस वाले साथ में थे। सुरेन्द्र मुल्जिम भी साथ में था। उसने बताया कि कुछ सामान गंगा जी में डाल दिया है और कुछ कुटिया में है। कुटिया में किताबें मिली थीं जो धूनी के अन्दर थीं। धूनी के ऊपर राख पड़ी थी। धूनी के अन्दर से किताबें पुलिस वालों ने निकाली थी। सुरेन्द्र ने बताया था।

26. Therefore, there is nothing in the statement of Vijay Singh Dhakad (PW4) so as to connect Surendra Kumar with the commission of offence. The learned Sessions Judge, while convicting the accused, has only relied upon the statement of

Surendra Kumar under Section 161 Cr.P.C. It is well settled that a statement under section 161 CrPC can only be used for the purpose of contradicting the evidence of a prosecution witness. It cannot be used for corroborating the evidence of a prosecution witness and as such it cannot be treated as a substantive evidence against an accused person. We are surprised that even while recording the deposition all kind of inadmissible evidence was allowed to go on record. The statements made by the witnesses to the police during investigation were thus indirectly brought on record and freely used. We strongly record our disapproval.

27. The third circumstance by which the prosecution tried to implicate the accused Surendra Kumar with the crime is that accused appellant Surendra Kumar tried to encash the travelers' cheques of the deceased from P.W.4 Vijay Singh. In his statement P.W.4 has stated as under:

दिनांक 22.12.99 को मेरे पास यही व्यक्ति ट्वेल्स से चैक लेकर आया था। 20 डालर का एक चैक था और अन्य सात चेक थे। इस व्यक्ति ने इन ट्वेल्स चैकों को कैश करने के लिए कहा था। यह ट्वेल्स चेक जेमीसन क्यूरेक के नाम के थे। मैंने इन चैकों को देखा था। इन ट्वेल्स चौकों पर न तो नम्बर पासपोर्ट का था न हस्ताक्षर थे। तब मैंने इन चेकों को कैश नहीं किया था और वह आदमी वापस चला गया। जो आदमी मेरे पास इन ट्वेल्स चैकों को लेकर आया था। वह मेरे से सामान आदि पहले से मांगने आता था। वह आदमी सुरेन्द्र चेला हरीनाथ था। जो हाजिर अदालत है।

However, no such travellers' cheque was recovered either from accused Surendra Kumar or from accused Harinath by the Investigating Officer and no such cheques were produced in the Court to prove this circumstance.

28. Since the case is purely based upon circumstantial evidence, we are of the opinion that a great care has to be observed before convicting the appellant as held by the apex Court in the case of Bodhraj alias Bodha and others Vs State of Jammu & Kashmir reported in 2000(8)SCC45, as under:

Further in this case the apex Court after placing reliance in padala Veera Reddy v. State of A.P. 1989 Supp (2) SCC 706 has held as under:

"12. In Padala Veera Reddy v. State of A.P. 1989 Supp (2) Scc 706 it was laid down that when a case rests upon circumstantial evidence, such evidence must satisfy the following tests: (SCC pp. 710-11, para 10)

"10. (1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that which all human probability the crime was committed by the accused and none else; and

(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence."

14. *Sir Alfred Wills in his admirable book Wills' Circumstantial Evidence (Chapter VI) lays down the flowing rules specially to be observed in the case of circumstantial evidence: (1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or*

circumstantial evidence the best evidence must be adduced which the nature of the case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with thh innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.

In the case Bodharaj alias Bodha (supra) the apex Court has further held as under:

> *"It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person (see Hukam Singh Vs. State of Rajasthan, Eradu Vs. State of Hyderabad, Earabhadrappa Vs State of Karnataka, State of U.P. Vs Sukhbasi, Balwinder Singh Vs State of Punjab and Ashik Kumar Chatterjee Vs. State of M.P.). the circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram Vs State of Punjab, it was laid down that where the case depends upon the conclusion drawn from circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and bring home the offences beyond any reasonable doubt."*

29. In the case Hanumant Govind Nargundkar Vs. State of M.P. (SCC pp. 345-346, para 10), the Apex Court has observed as under:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should be in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as exclude every hypotheses but the one proposed to be proved in other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

30. Again, the Apex Court in the case of Mohibur Rahaman & another Vs State of Assam reported in 2002 (45) ACC 687 (SC), has held as under:

"It is well settled by a catena of decision of this Court that in order to find conviction on circumstantial evidence each of the incriminating pieces of circumstantial evidence should be proved by cogent and reliable evidence and the Court should be satisfied that the proved pieces of circumstantial evidence taken together form such a chain wherefrom no inference other than of guilt can be drawn against the accused persons or, in other words, the proved pieces of circumstantial evidence should not be capable of being explained on any hypothesis other than guilt of the accused".

31. It is surprising that inspite of the fact that there has been a discussion about Baba Basuki Nath and Baba Sita Ram, the Investigating agency has not examined Baba Basuki Nath and Sita Ram and no efforts were made by the investigating agency to locate or examine the said persons. P.W.8 Kailash Panwar in his statement has stated as under:

सुरेन्द्र कुमार ने बताया था कि दि0 20.12.99 को जैमीसन रसैल नाम का एक अमेरिकन नागरिक बाबा सीताराम नामक साधू के साथ हमारी कुटिया पर सॉय करीब 5.30 बजे आया था वहॉ पर जैमीसन व सीताराम ने मेरे गुरू हरीनाथ व मरे साथ चिलम पी।

....

मैं बैगपाइपर की एक शराब की बोतल लेकर करीब 1.30 बजे दिन रायवाला से वापस कुटिया पर आया तब कुटिया में मेरे गुरू हरीनाथ व बाबा वासुकी नाथ व जैमीसन बैठे बातचीत कर रहे थे।

Further in the examination under Section 313 CrPC, a reference of Baba Sita Ram is also given. But, no efforts were made to locate and examine him also. The Sessions Judge has convicted both the accused persons.

31. From the following circumstances it is fully proved that the prosecution has failed to establish the connectivity of the accused appellant with the crime:

(i) No reliable evidence has been adduced to prove the discovery under section 27 of the Evidence Act and recovery of books like articles from the Dhooni is not probable.

(ii) The travellers' cheques have not been recovered not proved by the prosecution to connect the accused appellant with the crime.

(iii) Proper identification of recovered articles and dead body of the accused has not been made by the prosecution.

(iv) The prosecution has relied upon the statement of the accused under section 161 Cr.P.C. but not tried to examine the accused under section 164 Cr.P.C. before a Magistrate.

(v) No efforts were made by the Investigating agency to locate or examine Baba Basuki Nath and Baba Sita Ram.

32. To sum up we find that the prosecution has failed to prove the guilt of the accused by adducing reliable evidence for the discovery under section 27 of the Evidence Act. No independent witness has been produced to prove extra judicial confession of his guilt made by accused Surendra Kumar. The travellers' cheques alleged to be stolen by the accused from the deceased have not been recovered and proved and further that the recovery of books inside the Dhooni is not probable. Proper identification of the recovered articles has not been made by the prosecution to connect these items as belongings of the deceased. The prosecution has, not established connectivity of the accused with the crime in any angle whatsoever. The investigating officer has made statement regarding the confession of guilt made by accused Surendra Kumar in his statement under section 161 Cr.P.C. but the Investigating Officer did not make any effort to examine the accused under section 164 Cr.P.C. before a Magistrate. The entire evidence adduced by the prosecution is not conclusive to prove the guilt of the accused Surendra Kumar. From the evidence on record, complete chain of circumstances is not formed to prove the guilt of the accused Surendra Kkumar.

31. We are of the opinion that the prosecution has utterly failed to establish the facts and circumstances, which unerringly point out the guilt of the accused appellant for committing the

Murder of Jemison Russell (deceased) punishable under Section 302 read with Section 34 I.P.C. and for disappearing the evidence of said offence punishable under Section 201 I.P.C.

31. In the present case a foreign national was brutally murdered for the sake of money but due to lacunas in the investigation, accused person has succeeded to same him from the clutches of law. We, therefore, disapprove the investigation of such a sensitive offence.

33. The findings arrived at by the learned Sessions Judge cannot be upheld in so far as the accused Surendra Kumar is concerned. In the result, we allow the appeal and set aside the conviction and sentence passed by the Sessions Judge against the accused Surendra Kumar i.e. the appellant herein, under Section 302 read with Section 34 I.P.C. and Section 201 I.P.C. read with Section 34 I.P.C. The appellant Surendra Kumar is acquitted. We are thankful to the Amicus Curiae for the invaluable assistance that he has rendered in disposal of this matter.

34. Let a copy of the judgment along with record be sent to the Court below for needful action and compliance of the order.

(Rajesh Tandon, j.) **(V.S. Sirpurkar, C.J.)**

G